United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL
WITH PROOF
OF SERVICE

76-1303

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

PETER M. LAZARSKI, CRAIG L. NEWMAN, NEIL B. WINNER, YOK LEE and MARK McDONALD,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLANTS

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UNITED STATES COURT OF APPEAL
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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

Docket No. 76-1303

PETER M. LAZARSKI, CRAIG L. NEWMAN,
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MARK MC DONALD,

Defendants-Appellants.

BRIEF OF DEFENDANTS-APPELLANTS

ISSUES PRESENTED

1. Was the Court below correct in holding that seized evidence would not be suppressed despite defendants' claims of material misstatements in the affidavit for a search warrant?

2. Was the Court below correct in rejecting defendants' contention that hearsay statements in the affidavit did not comport with the requirements of Aguilar v. Texas, 378 U.S. 108 (1964)?

STATEMENT OF THE CASE

On December 18, 1975, after a search pursuant to a warrant the validity of which is the subject of this appeal, defendants LAZARSKI, NEWMAN, WINNER and LEE were arrested. On December 29, 1975 the grand jury for the Northern District of New York filed a two-count indictment charging these appellants with violations of 21 U.S.C. Sec. 841 (a)(1), 21 U.S.C. Sec. 846, and 18 U.S.C. Sec. 2. Thereafter, on or about February 4, 1976, the grand jury for the Northern District of New York filed a two-count indictment charging appellant McDONALD with violations of 21 U.S.C. Sec. 841 (a)(1), 21 U.S.C. Sec. 846 and 18 U.S.C. Sec. 2. All defendants moved to suppress the evidence seized as a result of the search. An evidentiary hearing was held on April 5 and 6, 1976. On April 29, 1976, Honorable James T. Foley denied motions of all defendants to suppress.

Thereafter on May 3, 1976, defendants LAZARSKI, NEWMAN, WINNER and LEE pleaded guilty to one conspiracy count of the indictment. Defendant MARK McDONALD pleaded guilty on May 5, 1976. All defendants were allowed to reserve their appeals on the suppression motions pursuant to a Court-approved stipulation under the authority of U.S. v. Burke, 517 F. 2d 377 (2d Cir. 1975). On June 26, 1976, the defendants were sentenced to a period of incarceration as young adult offenders under 18 U.S.C. 4216.

FACTS

On December 18, 1975 Special Agent Raymond W. Tripp, Department of Justice, Drug Enforcement Administration, Albany, New York, swore out an affidavit for a warrant to search a private dwelling at 209 Wolf Road, Town of Colonie, New York 12205 before Hon. John Spain, United States Magistrate. The affidavit stated[1] that Special Agent Tripp had reason to believe that a quantity of Methaqualone and/or Mecloqualone (both controlled substances under Schedule II, Ch. 13 of Title 21 of the United States Code) was being concealed at the above-mentioned premises. The affidavit (Joint Appendix at p. 19)[2] also asserted that there was reason to believe that various ingredients alleged to be used in the manufacture of Methaqualone or Mecloqualone, and various paraphernalia and instruments used in the manufacture of the controlled substances would be found therein.[3]

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1. Since a court, in determining whether probable cause existed for the issuance of a search warrant, may consider only the facts within the four corners of the affidavit presented to the issuing Magistrate, Aguilar v. Texas, 378 U.S. 108 (1964) this recitation of facts will be limited to factual matters within the affidavit, and information developed relating thereto.

2. References to the Joint Appendix herein shall hereinafter be abbreviated as "(A-)."

3. The ingredients listed at Paragraph 2 of the affidavit are: "Anthranilic Acid, N-Acetyl Anthranilic Acid, Ortho-Toluidine, Acetic Anhyadride, Phosphoryl Chloride, Polyphosphoric Acid, Acetic Acid and various solvents and chemicals..." (A-19, paragraph 2)

The facts set forth to support the affidavit are as follows: On December 11, 1975, Special Agent William T. Healey of the Drug Enforcement Administration, Newark, New Jersey, posing as an employee of BASF Wyandotte Corporation, helped defendant Craig L. Newman and an unidentified individual (later identified as defendant Yok Lee) load 20 110-lb. bags of Anthranilic Acid into a rented truck. The order was placed by Wilmington Farm Co-op, located at 10 Bryant Hill Road, Wilmington, Vermont (A-20, paragraph 3(a)).

Special Agents of the DEA conducted a moving surveillance of the vehicle, following it to 209 Wolf Road, and observed the bags of Anthranilic Acid being unloaded into the garage, then followed the return of the truck to a rental agency in Troy, New York (A-21, paragraph 3(b) and 3(c)).

Also on December 11, 1975, agents noticed the last name of defendant Peter M. Lazarski outside 209 Wolf Road, and observed a car arrive which was registered to defendant Neil B. Winner (A-21, paragraph 3(d) and 3(e)).

On the next day, December 12, 1975, agents observed the premises at 209 Wolf Road and determined that "Certain windows at 209 Wolf Road were boarded up and that other windows were covered by either cardboard or closed venetian blinds." (A-22, paragraph 3(f)).

Between December 12, 1975 and December 18, 1975, the date of execution of the affidavit, Special Agent Lon W. Sturrock had certain telephone conversations with Paul DeZan, who is described as "Chemist, United States Department of Justice, Drug Enforcement Administration, Northeast Regional Laboratory, New York City." (A-22, paragraph 3(g)). In view of the pivotal nature of these statements made by Agent Tripp in his affidavit,

purportedly quoting Sturrock's accounts of his communications with DeZan, they are set forth in full, as follows:

> "(1) Anthranilic Acid is a precursor to Methaqualone and/or Mecloqualone; that is, Anthranilic Acid is combined with Acetic Acid or Acetic Anhyadride to produce Acetyl-Anthranilic Acid which when combined with Ortho-Toluidine and Chloryl Chloride and heat is applied, produces Methaqualone. Ortho-Chloroaniline and a reagent can be combined with Acetyl Anthracilic Acid (a similar process to produce Methaqualone. (sic)
>
> (2) That, beside the manufacture of Methaqualone and Mecloqualone, the only other uses of Anthranilic Acid is in the manufacture of analgesic drugs and certain veterinary products." (sic)

The affidavit further states that on July 7, 1975, another order for Anthranilic Acid, 440 lbs., had been placed by the Wilmington Farm Co-op and paid for by a personal money order in the name of James Ewing. On December 18, 1975, Special Agent Tripp was informed by Richard Pratt, Chief of the Wilmington Police Department, that there was "no record" of a Wilmington Co-op, James Ewing or a Bryant Hill Road in Wilmington, Vermont. Further, unspecified "telephone authorities" informed the affiant that the telephone number appearing on the July 7, 1975 purchase order was fictitious (A-22, paragraph 3(h) and 3(i)).

Finally, on December 15, 1975, the DEA obtained records for telephone toll receipts of numbers in the names of defendants Lazarski, Newman and Winner, which showed: (1) from the Lazarski number, three calls to SGA Scientific Supply Company, Bloomfield, New Jersey on November 4, 5 and 21, 1975, and one call to Conso Lab Supply Company, Westbury, New York on November 21, 1975; (2) from the Winner number, calls placed to four chemical companies on July 16, 18 and 25, 1975; (3) from the Newman number, calls to the Conso Lab Supply Company, on June 22 and 23, 1975, and July 7, 10, 16 and 25, 1975 (A-23, paragraph 3(j)).

On December 17, 1975, Special Agent Paul Sennett contacted Conso Lab Supply Company and learned that defendant Newman had obtained four kilos of Anthranilic Acid in May, 1975, 56 pounds of Acetic Acid in June, 1975, and on "either July 18 or August 19, 1975" picked up quantities (of unspecified amount) of Ether, Sodium, Sodium Acetate, and Acetic Anhyadride, and ordered 48 kilos of Ortho-Toluidine in June, 1975, on back order (A-24, paragraph 3(k)).

The affidavit further states that defendant Lazarski was a chemical technician at the Hudson Valley Community College, and that surveillance indicated that the Anthranilic Acid delivered had not been removed from the garage at 209 Wolf Road (A-24, paragraphs 3(l) and 3(m)).

On April 5 and 6, 1976, an evidentiary hearing was held before the Honorable James T. Foley on motions of all defendants to suppress articles seized at 209 Wolf Road on grounds that the warrant issued December 18, 1975 by United States Magistrate John H. Spain was improperly issued in that the affidavit before the Magistrate contained important misstatements of fact. Such misstatements, it is urged, were material to a determination of probable cause, and without inclusion of the false allegations of fact, a finding of probable cause would have been unwarranted as a matter of law.

Appellants contend that the evidentiary hearing on motions established several uncontroverted facts demonstrating the falsity of the affidavit. First, and most importantly, the affidavit stated that, aside from the manufacture of Methaqualone and Mecloqualone, the only uses of Anthranilic Acid, the chemical delivered to 209 Wolf Road, "is in the manufacture of analgesic drugs and certain veterinary products."

Dr. Frank Soa, called by appellants at the evidentiary hearing, and a leading expert in organic chemistry, testified that the statement in the affidavit was incorrect (A-158, 159). He testified that large quantities of Anthranilic Acid are used in dye chemicals and compounds (A-159), in production of saccharine sweeteners (A-160), as anti-oxidants for lubricants and petroleum products, in vegetable oils, as preservatives (A-161), to remove scale from steel, for stabilization of polymeric material, in fungicides and insect repellants, in the chemistry of alkyd resins (A-161), in surfactor chemistry and the chemistry of surface tension, in paints, perfumes and artificial flavors (A-163, 164), and that its many and varied uses stem from the fact that, depending on the techniques used, Anthranilic Acid can function either as acid or base. It is this unique property that gives this non-controlled, common chemical substance literally hundreds of uses as a chemical reagent (A-164, 165).

Appellants also called Mr. William Timm, an expert chemical engineer, who likewise testified to the many and varied uses for Anthranilic Acid (A-189, 190). He testified that Anthranilic Acid is one of the basic building blocks of chemistry (A-186). He further stated that 98% of all Anthranilic Acid is used for purposes other than manufacture of drugs including legal licensed preparation of Methaqualone and Mecloqualone, and that less than 1% of all the Anthranilic Acid manufactured goes to illicit uses. Both Dr. Soa and Mr. Timm agreed that the statement in Paragraph 3(g)(2) of the affidavit was false in that it omitted the vast majority of uses of Anthranilic Acid, and that the uses firmly declared in that paragraph to be the only uses comprised only a small percentage of Anthranilic Acid use (A-165, 188).

It was also established, and uncontroverted, that the affidavit listed several incorrect names for chemicals, including one chemical, "chloryl chloride" which does not even exist (A-165, 168, 177, 192, 250, 252--testimony of Mr. Paul DeZan). It is not contended by appellants that such incorrect wordings, spellings and chemical impossibilities were necessarily sufficiently material to invalidate a finding of probable cause. However, such errors are indicative of what appellants contend was a supervening lack of concern for accuracy that permeates the factual content of the agent's affidavit.

Both Dr. Soa and Mr. Timm testified that many methods, secretive in nature, are used in the chemical industry and by chemical researchers to mask the sources of the chemicals used, the chemicals ordered, and the name of the orderer (A-168, 170, 193, 194). There is nothing unusual, according to Mr. Timm, in a research chemist ordering 1000-2000 pounds of Anthranilic Acid (A-192, 193), and many research chemists have home laboratories (A-195). He further stated that the most reasonable inference to be drawn from a 2000-pound order of Anthranilic Acid with no traceable ordering firm is that "I would be assuming that the company is trying to cover up their order so that their competitors would not know what research they are doing...." (A-196).

Mr. Timm also testified that the most reasonable inferences to be drawn from the existence of "some" well-covered windows in a dwelling in Northern New York in December would be that the purpose of such covering was to keep the cold out, or to keep light out to prevent the decomposition of light-sensitive products, or to conceal valuable equipment (A-196, 197).

Finally, Paul DeZan, the government chemist who was consulted prior to filing the affidavit, agreed in his subsequent testimony that the statement in Paragraph 3(g)(2) was not correct, claiming that when he had actually said was that the uses set forth in Paragraph 3(g)(1) of Agent Tripp's affidavit were the only uses of Anthranilic Acid of which he was aware (A-225, 238). DeZan further admitted that he did not feel qualified to disagree with the statement that 98% of all Anthranilic Acid was used in processes and products other than those listed in Paragraph 3(g)(2) of Tripp's affidavit (A-246, 261, 274). DeZan further disclosed on cross-examination that he did not make a thorough inquiry into the uses of Anthranilic Acid, did not even know where to look for such information, had no chemistry experience outside of forensic chemistry and analysis of drugs, and that he did not consult other chemists with more knowledge or experience (A-231, 232, 236, 239, 244).

Further, although Anthranilic Acid is listed as a "precursor" to the manufacture of Methaqualone or Mecloqualone in Paragraph 3(g)(1), he testified that he thought Anthranilic Acid was not in fact a precursor of Methaqualone or Mecloqualone in the statutory sense. (See 21 U.S.C. 802(22) -- Anthranilic Acid is not a "precursor" of any controlled substance.)

Although Ether and Sodium Acetate (but not Sodium) are listed among the chemicals picked up by the defendant Newman in Paragraph 3(k) of the affidavit, there is no indication by which the Magistrate would know that such chemicals play absolutely no part in the manufacture of Methaqualone or Mecloqualone (A-287, 288). Similarly, the Magistrate could not

possibly know from the affidavit that the other chemicals listed, such as Ortho-Toluidine and Acetic Anhyadride, had a multitude of lawful uses (A-182, 185, 193, 207).

The effect of all of these false statements and omissions was that the Magistrate was led to believe that a chemist receiving 2000 pounds of Anthranilic Acid and perhaps some other chemicals was probably manufacturing controlled substances (Lazarski was known by the affiant agent to be a chemical technician (A-23, paragraph 3(ℓ)). Had the Magistrate been more fully and accurately informed, he would have known that there was less than a 2% likelihood of any pharmacological use of the Anthranilic Acid alleged to be upon the premises, that less than 1% of its use is diverted into illicit purposes, and that only <u>one</u> critical substance was shown by the affidavit to have been on the premises to be searched.

Under these circumstances, and for the reasons expressed in appellants' Argument, the Magistrate could not make a reasonably-informed ruling as to probable cause, and, accordingly, the seizures made pursuant to the invalid warrant should be suppressed.

* * *

ARGUMENT

POINT I: THE COURT BELOW SHOULD HAVE SUPPRESSED THE ARTICLES SEIZED BECAUSE OF MATERIAL MISSTATEMENTS CONTAINED IN THE SEARCH WARRANT APPLICATION.

Magistrate Spain, in deciding whether probable cause existed to issue a warrant, was confronted with an affidavit which was materially incorrect in several respects. Most important was the fact that Paragraph 3(g)(2) informed him that "besides the manufacture of Methaqualone and Mecloqualone, the only other uses for Anthranilic Acid is in the manufacture of analgesic drugs and certain veterinary products." (sic) (A-22, paragraph 3(g)(2)). The ordinary import of this statement to a non-scientist Magistrate would, obviously, be that the primary use of Anthranilic Acid is in the manufacture of controlled substances, accompanied by only two other commercial uses both of which are also apparently pharmaceutical. Such a statement must have caused the Magistrate to completely misapprehend the nature of the substance in question and grossly and inaccurately magnified the probability of criminal activity on the subject premises (bearing in mind that Anthranilic Acid was the only chemical unequivocally shown to be present at the Wolf Road premises).

The Court below stated that:

> Perhaps the use of the word "only" in paragraph 3(g)(2) in a strictly grammatical sense was ill-advised, but nonetheless both legal and illegal uses of Anthranilic Acid are mentioned in that paragraph and it thereby gives basis for a proper inference that either legal or illegal substances could be manufactured." (A-321).

This analysis completely ignores the uncontroverted hearing testimony to the effect that, while Anthranilic Acid conceivably

could be used illicitly, its legal uses comprise 99% of all uses (A-208). Furthermore, the fact that only pharmaceutical uses are cited in Tripp's affidavit blinded the Magistrate to the additional fact, established at the suppression hearing, that 98% of all Anthranilic Acid is used in other than pharmaceutical processes (A-191). The Court's analysis also ignores the fact that this common chemical has hundreds upon hundreds of applications, and is one of the basic building blocks of chemistry (A-165, 187, 245). It simply cannot be said that the bare allegation that some impliedly minor lawful and pharmaceutical commercial use, as set forth in Tripp's affidavit, could afford the Magistrate any accurate sense of the nature of the substance in question, nor, more significantly, could such incomplete and inaccurate information provide a substantial and adequate foundation for the inference of illicit use of the substance, critical to the issue of probable cause (again bearing in mind that Anthranilic is, itself, an innocuous legal substance).

Second, the affidavit lists Anthranilic Acid as a precursor to Methaqualone or Mecloqualone. The term "precursor" is, of course, both a chemical and statutory term of art. Immediate precursors are defined in 21 U.S.C. §802(22), and Anthranilic Acid is not a listed substance. The impression given by the cited statements in Tripp's affidavit is that anthranilic acid is a chemical inexorably linked to criminal chemical manufacture, an assertion which is wholly unsupportable in light of the uncontroverted hearing testimony of defendants' expert witnesses. Accordingly, appellants urge that the Court below erred in finding that the misstatements in the affidavit were not material to the determination of probable cause.

This Court, in common with other Circuits, has apparently adopted the rule that in order to determine the materiality of a false statement in an affidavit, the affidavit is to be read without the challenged allegations of fact. If probable cause is absent from such a redacted affidavit, the misstatement is material. United States v. Pond, 523 F.2d 210, 214 (2d Cir. 1975), cert.denied, _____U.S._____(1976); United States v. Gonzalez, 488 F.2d 833 (2d Cir. 1973). See also, United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971), cert. denied, 405 U.S. 934 (1972). Applying this test in the instant case, the affidavit becomes devoid of any indication of the nature and uses of Anthranilic Acid, and is limited to the following facts: (1) Anthranilic Acid (neither a controlled substance nor an immediate precursor thereof) was picked up from a chemical supplier; (2) it was ordered under a fictitious name; (3) various persons observed to have been present on one or more occasions at the chemist's residence to which it was delivered had telephoned chemical companies; (4) one defendant had picked up some chemicals nearly six months previously with no showing of any subsequent delivery to 209 Wolf Road; and (5) that the residence gave the physical appearance of some secretive activity. Appellants contend that these facts, alone, are completely insufficient to establish probable cause. See, for example, U.S. v. Failla, 343 F.Supp. 831 (W.D.N.Y.1972), discussed more fully in POINT II, infra.

At the outset it should be noted that the Court below began and ended its analysis of appellants' contentions with the familiar refrain from United States v. Ventresca, 380 U.S. 102, at 105(1965) that affidavits should not be interpreted in a

"hypertechnical" but rather in "common sense" manner (A-317). The problem with this proposition is that the affidavit itself dealt with highly technical and precise subject matter. This Court should also note that it was by choice rather than necessity that agent Tripp relied upon double hearsay telephonic communications concerning subject matter apparently wholly outside of his knowledge and expertise (Cf. U.S. v. Pond, 523 F.2d at 214). There simply is no suggestion in this record that there exists a "common sense" manner of interpreting a chemical equation or reaction or a statement concerning the "only" uses of a lawful chemical. Both of these allegations were intended to be taken as expert and therefore technical statements of scientific fact.

Furthermore, in dealing with the question of misrepresentation or mistake in the affidavit, the Court below found only that the challenged allegations were not sufficiently material to warrant controversion and suppression and really made no determination of the degree of culpability involved. Appellants contend that the false statements in the instant affidavit are both material and, at the very least, negligently inserted by Agent Tripp. While the law is not settled in this Circuit, the Court has implied on at least two occasions that a negligent misstatement of a material fact will vitiate a warrant. As the Court wrote:

> In United States v. Bozza, 365 F.2d 206, 223-224 (2d Cir.1966), the Court appeared to say that a negligent misstatement would upset a warrant only if that misstatement was material.
> United States v. Gonzalez, supra. 448 F.2d at 837.

This Court in United States v. Pond, supra, also inferred that a material, negligent false statement would upset the warrant (523

F.2d at 214). It is clear that some other circuits apply a rule that any material misstatement requires suppression of the seized evidence, regardless of the affiant's intent or the care taken by him: United States v. Morris, 477 F.2d 657 (5th Cir.), cert. denied, 414 U.S. 852 (1973); United States v. Harwood, 470 F.2d 322 (10th Cir. 1972); Cf. United States v. Belculfine, 508 F.2d 58 (1st Cir. 1974).

Should this Court now hold that a material misstatement must be negligently made in order to require suppression, the record is replete with evidence of such negligence. As to DEA chemist Paul DeZan, the hearing conclusively showed that he had no training or experience in the uses of Anthranilic Acid (A-232); and that he failed to use sufficient effort to determine the uses of the chemical, despite the fact that relevant (albeit out-dated) information existed within his own library (A-234-235, 239-240) (Soa recall). He admitted that the chemicals that he had stated to the DEA agents were used to make Methaqualone and Mecloqualone in fact could be used in practically endless varieties of other combinations to produce perfectly legal substances (A-251, 255). He did not confer with experts or consult standard reference materials (A-234, 237, 240), and he acknowledged that "I guess I just didn't take it too seriously with respect to if he was quoting or writing something down as I was conversing with him" (A-173). DeZan failed to make notes or maintain any records. (A-277-8, 291).

The government urged below that, in determining the issue of neglect or recklessness in the making of a warrant application, the Court must not look beyond the affiant to his source. Assuming, arguendo, that such constitutes the general

legal rule respecting informants and the accuracy of their statements to law enforcement officers, the same rationale should not and does not apply, we submit, to an "informant" who is also an agent or member of the law-enforcement establishment. To hold that a reviewing Court's inquiry into the falsity of a fellow officer's statement is precluded, would be to sanction, if not encourage, police to fail to check the accuracy of things told to them by their colleagues; to rely on statements of fact blindly; and to ignore inconsistencies, stopping just short of perjury or actual knowledge of untruth. Additionally, such a rule would create the anomalous result that a negligent misstatement by a police officer would vitiate a warrant if he is the affiant but not if he is merely quoted by the affiant. Surely, the prophylactic purpose of the Fourth Amendment is not to encourage such behavior on the part of law-enforcement officials.

Should this Court adopt the government's argument and confine its scrutiny to the affiant, appellants would submit that the record contains ample evidence of Agent Tripp's neglect. Agent Tripp failed to confirm with Agent Sturrock the qualifications of the source of Sturrock's technical information, omitted any statement of such qualifications from his affidavit, and apparently failed to request that DeZan provide anything in writing or to read the information back to DeZan to check its accuracy (A-280). Either Agent Tripp or Agent Sturrock misquoted DeZan, the chemist, twisting the meaning of his statement. The affidavit had at least three textual errors of a chemical nature in as many lines. This, appellants submit, amounts to negligent misstatement on the part of the affiant as well. Also, since it appears to be the law of

warrant applications that the information of a brother officer in a policeman's affidavit is deemed to be per se reliable insofar as observations are concerned, it is no more than logical and consistent that the brother officer's neglect be attributed to the affiant, as well. See U.S. v. Ventresca, supra, 380 U.S. at 111.

Appellants also recognize that some courts have adopted a stricter standard concerning inaccurate warrant applications that apparently differs from the law of this Circuit. United States v. Lee, No. 75-1068 (4th Cir. May 17, 1976); United States v. Carmichael, 489 F.2d 983 (7th Cir. 1973) (en banc); United States v. Marihart, 492 F.2d 897 (8th Cir.), cert. denied, 419 U.S. 827 (1974). These courts require that a false statement be either intentionally or recklessly made, in order to require suppression of evidence. The adoption of a knowing or reckless standard, however, again logically is counterproductive to the ends of justice. The application of such a standard to daily police procedure would translate into the message that since mere negligent misstatement is acceptable, diligent investigation of tips and information is unnecessary and, indeed, unwise in preparing a warrant application. Appellants urge that the standard of negligence is the appropriate one, although it well may be that the actions of the DEA agents in the instant case could be found to amount to recklessness.

Recently, the Fifth Circuit Court of Appeals enunciated a further standard in scrutinizing a warrant application whose accuracy is challenged, as follows:

> "(A) mistake could invalidate the warrant only if its correction, reviewed with the other legitimate allegations, presented a very close case on probable cause." United States v. Park, 531 F.2d 754, 759 (5th Cir. 1976) (citation omitted).

Should this Court feel pursuaded that this standard is the correct one to be applied, appellants submit that the only correction which could have had substantive meaning to a non-chemist Magistrate would have been a correct statement of the known uses of Anthranilic Acid which would have reduced the probability of criminal activity at the Lazarski premises to a point where the issue of probable cause would no longer have been close.

Thus, whether the inaccuracies are to be deleted or corrected, the lower court should have granted appellants' motions to suppress.

Finally, appellants submit, the question of whether the errors or misstatements were merely "slight variation(s)" from the truth, "misconception(s)," or grammatically "ill-adivsed" (A-320), as they are characterized by the Court below, is wholly without relevance to the issues of materiality and neglect upon which this warrant stands or falls. There can be no question that the challenged paragraphs are incorrect and misleading; that without them the affidavit contains no inference of probable criminality; and that the preparation of the application is permeated with neglect on the part of DEA Agents Sturrock and Tripp and Chemist DeZan.

At the risk of belaboring the point appellants urge that this Court should hold these agents to a rather strict standard of care. We do not deal here with allegations of fact concerning mere sensory observations and rational conclusions of police officers. Rather we have scientific data set forth by an affiant,

attributed to a supposed expert. There was no way for the issuing Magistrate to apply a common sense interpretation to this challenged information; no way for him to explore or question the validity of the information by examining the affiant; and, most importantly, absolutely no likelihood that he would be able to ascertain the inaccuracy of the information at the time of the application. The whole idea of the Fourth Amendment warrant requirement is that the inference of probable criminal behavior must be drawn by the Magistrate and not by the police agent. See, Coolidge v. New Hampshire, 403 U.S. 380. The Court below seems to state, in effect, that it does not matter whether the Magistrate relied upon a chemical formula or reaction that could not work and a synopsis of the general usage of Anthranilic Acid that was roughly 2% correct in finding probable cause, provided only that the Chemist himself had at some point telephonically relayed reasonably accurate information to a colleague of the affiant. The error in such a ruling is that the Chemist clearly has been assigned by the Court below the authority of the Magistrate. Conferring upon the Magistrate his proper role, a technically correct application is indispensible to the fair determination of probable cause in this case, since the stated chemical process and the probability of the appellants' criminal use of Anthranilic Acid in such a process are pivotal.

POINT II: READ IN ITS ENTIRETY THE AFFIDAVIT IN APPLICATION FOR THE SEARCH WARRANT FAILS TO SUSTAIN AN INFERENCE OF PROBABLE CAUSE

United States v. Failla, supra, presents strikingly similar factual circumstances to the case at bar. There the defendant, under a false name, received delivery of a quantity of lithium aluminum hydride, a reagent which can be used in the preparation of a controlled amphetamine drug. In Failla, moreover, the court assumed some illicit connection between the chemical received and the other circumstances (343 F. Supp. at 832 n.1.). That the defendant associated with a person on the premises who in turn associated with a known narcotics offender was not considered probative. The Court held that the knowledge of officers in Failla amounted to no more than mere suspicion which fell short of probable cause.

There are many similarities between Failla and the instant case. There, as here, there was no record of the presence of any illegal drugs, only of one legal ingredient. There was no attempt to hide delivery, and while Failla signed a false name for the package delivered, defendant Newman signed his own name. Like Failla, defendant Lazarski was involved professionally with chemical laboratory preparations, and as in the Failla case, the agents failed to check if Lazarski had a license to work with controlled substances. Appellants urge that the fact that Lazarski was a chemical technidan tends to be exculpatory, since he would be naturally expected to have a laboratory and to order chemicals. There was no informant in either case, no corroboration of any

criminal activity. Perhaps the only difference would be that Failla's laboratory was open, while some windows were covered at 209 Wolf Road. However, the fact that windows are covered, in and of itself, will not support an inference of criminal activity.

Telephone calls to chemical companies are likewise not supportive of an inference of criminality. In the absence of any information concerning the contents of the telephone calls made from the numbers registered to defendants in this matter, in the further absence of any information as to the results of such telephone calls or who made such calls, and particularly with reference to the fact that all such calls occurred long before the application for the warrant herein, and were largely unconnected to the subject premises, it is urged that these allegations should be discarded as non-probative. The Government here contends that in the case of a continuing criminal enterprise, the staleness of information does not vitiate the probative value or weight it is to be given. In the first place, this contention wholly begs the question, which, properly stated, is "Can an act taking place months ago be connected with another present act (both legal) to create an inference of criminality?" It should also be noted that the cases cited below by the Government in support of the affirmative response to that question dealt with periods of days or weeks. The defendants here have been unable to locate any case holding probative information concerning the location of substances months prior to the application for a warrant, nor deeming probative telephone calls made months prior thereto. This Court may wish to take note or the opinion of the U. S. District Court for the Western

District of Pennsylvania in U. S. v. Sawyer (213 F. Supp. 38), in which the Court noted its inability to find a case in which a warrant was upheld on the basis of information more than thirty days old.

A fortiori, the fact that the defendant Newman may have taken delivery of some other chemicals almost six months previous should not be deemed determinative. Although names of chemicals are mentioned (some which could be used in the manufacture of controlled substances, but all of which have many other varied applications) none are established to have been present at 209 Wolf Road either at the time of the application or at any other time. Moreover, at least three chemicals so listed are inconsistent with the manufacture of Methaqualone or Mecloqualone.

The Court below distinguished Failla on the ground that there, officers were unable to locate a Judge or Magistrate, and seized without a warrant, while here, the matter was submitted to a Magistrate and a warrant issued. The appellants do not dispute the rule that in close cases, deference is to be accorded to warrants. United States v. Ventresca, supra. However, no court has ever held that the nature of probable cause changes, and that there is a different standard for a Magistrate than for a police officer. While a Magistrate may be in a position to make closer determinations, a lack of probable cause for an officer is a lack of probable cause for a Magistrate as well. In Failla, the facts, looked at in their entirety, simply did not add up to probable cause. Mere suspicion is insufficient whether entertained by a DEA agent or by a federal Magistrate. And as previously noted

here, absent the false statements, there cannot be an inference as to the illicit possibilities of Anthranilic Acid. Defendants would submit that even with the false statements, the facts in Tripp's affidavit do not amount to probable cause, and the seized articles should be suppressed.

Several cases urged below by the government to support a finding of probable cause simply are not in point. In U. S. v. Noraikis, 418 F 2d 1177 (7th Cir. 1973), vacated as to one defendant on other grounds, 415 U.S. 904 (1974), all necessary substances were present and the defendant's only argument was that the electrical power was not available and the packages remained sealed. Such a factual situation is plainly distinguishable from the facts of this case even crediting the false allegations in Tripp's affidavit. In U.S. v. Moore, 456 F. 2d 569 (2d Cir. 1974), laboratory work of a chemical firm during suspicious, late-night hours, the smell of Ether, indicating the manufacture of controlled substances, the traced presence of most or all the alleged precursors upon the premises, and the DEA agents' check of defendants' credentials with the U.S. Food and Drug Administration, all taken together, established probable cause upon the foregoing factors here absent. In U.S. v. Smith, 499 F. 2d 251 (7th Cir. 1974) a reliable informant had provided fully-corroborated information which was held sufficient to constitute probable cause. In U.S. v. Welebir, 497 F. 2d 436, (4th Cir. 1974) corroborated information from a reliable informant was added to the smells, indicating manufacture of controlled substances and such, together, were held to be sufficient to

constitute probable cause. Thus, none of the cases cited by the Government below are determinative upon the facts in this case.

Finally, it should also be noted under this line of argument that the pivotal allegations, Paragraphs 3(g)(1) and (2), are attributable to Paul DeZan, a DEA Chemist who was presumably being quoted as an expert upon the subject matter of the paragraphs. However, the affiant made no effort whatsoever to qualify his informant as an expert (and, as to the crucial representation concerning the "only uses" of the substance, he probably could not have done so). Although, as previously noted, information passing between fellow officers engaged in the investigation of a criminal enterprise may be an exception to the Aguilar-Spinelli requirements of verification and corroboration of hearsay information, it is submitted that the circumstances of this case will not support the rationale behind the Court's holding in Ventresca, supra, (13 L.Ed 2d at 690). In the first place we do not have "fellow officers of the government engaged in a common investigation." Rather, we have DEA agents in the Albany office telephonically consulting a non-agent technician who happens to be employed by the DEA. Secondly, we do not have here a simple exchange of sensory observations from one policeman to another, but rather a precise chemical equation and a professional opinion on probable unlawful use of a lawful substance which the affiant himself was wholly unqualified to render.

The requirement of setting forth an informant's expert qualifications where his information and/or opinion is based upon the employment of technical training or sensory skills not

possessed by the affiant or Magistrate was emphasized by this Court in U.S. v. Pond, supra, 523 F. 2d at 212-213. Furthermore, this requirement exists distinctly and entirely apart from the requirement that the basis of the "expert's" knowledge also be set forth to satisfy hearsay requirements, as more fully discussed hereinafter.

POINT III: THE AFFIDAVIT CONTAINS HEARSAY DECLARATIONS WHICH WERE IMPROPERLY UTILIZED IN THE DETERMINATION OF PROBABLE CAUSE AND WITHOUT WHICH THE AFFIDAVIT IS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE FOR THE ISSUANCE OF A SEARCH WARRANT.

It is well established that factual assertions in an affidavit for a search warrant which are based upon hearsay are proper under the provisions of Rule 41(c) of the Federal Rules of Criminal Procedure and the controlling case law: United States v. Harris, 403 U.S. 573 (1971); Spinelli v. United States, 393 U.S. 410 (1969).

It is also well established, however, that, when such hearsay declarations are utilized to support a finding of probable cause, the affidavit must disclose the factual circumstances of the hearsay declarant's knowledge or observations, United States v. Harris, supra; Spinelli v. United States, supra; and in addition, the affidavit must provide specific facts from which it may be determined by the Magistrate whether the hearsay declarant is reliable or credible: Aguilar v. Texas, 387 U.S. 108 (1964); Jones v. United States, 362 U.S. 257 (1960). These requirements are further reinforced by the provisions in Rule 41(c) allowing the Magistrate to require the affiant and any witnesses he may

produce to appear personally for examination under oath before him.

The purpose of these requirements, of course, is to insure that sufficient facts are disclosed to the Magistrate to enable him to make an independent judgment as to whether there is a demonstrated probability of crime and whether the items sought to be seized are presently in the place to be searched. This Court has recently approved the protective nature of the Spinelli-Aguilar requirements in United States v. Karathanos, 531 F. 2d 26 (2d Cir. 1976).

Hearsay declarations were contained in Paragraphs 3 (g) (1), 3(g) (2), 3(i) and 3 (k) of the affidavit of Special Agent Tripp upon which the search warrant was issued in the instant case. In each case the two-fold test for the acceptance of hearsay declaration outlined above was not met and these paragraphs should not have been considered by the Magistrate in his determination of probable cause.

In Paragraphs 3(g) (1) and 3 (g) (2) it is asserted that Paul DeZan, Chemist, United States Department of Justice Drug Enforcement Administration, advised Special Agent Lon W. Sturrock who in turn advised the affiant Special Agent Raymond W. Tripp that Anthranilic Acid is a precursor to Methaqualone and/or Mecloqualone and that, besides its use in manufacturing these substances, its only other uses are in the manufacture of analgesic drugs and certain veterinary products.

These factual assertions are clearly hearsay in nature and are, in fact, double hearsay and therefore must meee the two-fold standards of the Aguilar test. At the first stage of

this test, the affidavit clearly does not present any factual basis for Mr. DeZan's belief that Anthranilic Acid is a precursor of these controlled substances or that the only other use of Anthranilic Acid besides the manufacture of these controlled substances is in the manufacture of analgesic drugs and certain veterinary products. Nor does the affidavit present facts indicating that Mr. DeZan is either reliable or credible in making these factual assertions. The mere fact that he is identified as a government chemist does not automatically establish him as a credible and reliable declarant, particularly with respect and regard to the assertions about the various legitimate uses of Anthranilic Acid contained in Paragraph 3(g)(2). In fact, he knew virtually nothing about the subject of the statements contained in Paragraph 3(g)(2). The truth of this assertion was cogently demonstrated in the hearing.

This Court appears to have squarely held in Karathanos, supra, that the issuing magistrate may not simply infer the basis of knowledge element of the Aguilar-Spinelli test-- the basis must be set forth in the affidavit. At the very least the basis for the scientific data and opinions attributed to Chemist DeZan in Paragraphs 3(g)(1) and (2) should have included a synopsis of his credentials and a statement setting forth the manner in which the opinion as to uses of Anthranilic Acid was arrived at. Had the Magistrate had the full knowledge of DeZan's education and experience and the cursory manner in which he attempted to ascertain the uses of Anthranilic Acid it surely cannot be said that a warrant would have issued. Since, as hereinbefore pointed

out, the information from DeZan does not fit within the "brother officer" exception to the Aguilar-Spinelli standard and since this information is unsupported by any factual allegation of reliability of either informant or information, it should not have been considered in the probable cause determination in this case.

The assertions contained in Paragraph 3(i) that there is no record of the Wilmington Farm Co-op., Bryant Hill Road, or James Ewing in Wilmington, Vermont, and that the phone number (302) 254-6002 which appears on Exhibit B attached to the search warrant is false likewise are hearsay declarations and do not meet the Aguilar test.

Once again, the affidavit must disclose the factual basis for the hearsay declarant's knowledge. This factual basis is not provided in either case. The affidavit does not disclose in any way the facts on which Richard Pratt determined that "there is no record of a Wilmington Farm Co-op., a Bryant Hill Road, or a James Ewing in Wilmington, Vermont." There is no indication of what records, checks or knowledge the conclusory statement is based upon. It might well be that no checks were made nor any investigation conducted and that Mr. Pratt was merely offering an opinion. Likewise, the affidavit does not provide any factual basis for the assertion by "telephone authorities in the Vermont District" that the telephone number (802) 254-6002 is "false and fictitious." The source of this information is not even specifically identified and there is absolutely no indication of how it was determined that this phone

number was false and fictitious. Nor does it indicate when these checks were made and the fact that this phone number allegedly did not exist in December 1975 did not mean that it did not exist when it appeared on the purchase order on July 2, 1975. The first part of the hearsay test, then, that the factual basis for the declaration must be revealed, has clearly not been met in either case.

The second part of the hearsay test, that the affidavit must provide specific facts which show that the hearsay declarant is reliable and credible, is likewise clearly not met. There are no facts in the affidavit to show that Richard Pratt is reliable and credible in stating that there is no record of a Wilmington Farm Co-op., Bryant Hill Road, or James Ewing in Wilmington, Vermont. Mr. Pratt is not shown to be knowledgeable or to possess any special expertiese in such matters and the simple fact that he is Chief of Polic in Wilmington, Vermont does not establish such knowledge or expertise, since he is not a fellow officer jointly engaged in the investigation of this case. There is no factual assertion that he is a long-time resident of Wilmington, Vermont. In the same vein, it is impossible to determine whether unidentified "Vermont telephone authorities" are credible or reliable since we are not even informed of their identity. The affidavit does not even show that these unidentified authorities are in the Vermont District which encompasses Wilmington, Vermont, since no particular Vermont District is identified. Nor does the affidavit indicate that these telephone authorities, whoever they are, have any responsibility or knowledge or expertise in providing the

information requested.

In short, the factual assertions contained in Paragraph 3(i) of the affidavit clearly do not meet the two-fold test required by Aguilar v.Texas, supra, and thus may not be used in determining whether or not the affidavit of Special Agent Tripp contained probable cause for the issuance of the search warrant in this case.

Lastly, the assertions contained in Paragraph 3(k) of the affidavit relating to orders placedand chemicals received by the defendant Newman from the Conso Lab Supply Company in May, June, July and possibly August of 1975 are hearsay declarations and also fail to meet the standards of the Aguilar test.

It is not clear from the paragraph how many layers of hearsay these assertions passed through before being recorded in the affidavit. The paragraph states that the affiant was "advised that Paul Sennett, Special Agent, Drug Enforcement Administration, contacted the Conso Lab Supply Company and learned that the defendant Newman had allegedly ordered and received certain chemicals. It does not state whether Special Agent Sennett so advised him or whether someone else advised him of Special Agent Sennett's action how they learned of this action. There may be at least one level of hearsay here and perhaps two levels of hearsay. The paragraph also does not reveal how it was determined from the Conso Lab Supply Company that the defendant Newman had allegedly ordered and received certain chemicals. There thus may be a third level of hearsay

presented if an employee of the Conso Lab Supply Company made declarations to this effect.

On the basis of the assertions made in this paragraph it would be impossible for Magistrate Spain to determine whether or not the two-fold test of Aguilar v. Texas, supra, was met. He would have to have called some witnesses or received other information in order to make such a determination. There is no record that such an action was taken and the factual assertions contained in this paragraph may thus not be used to determine probable cause.

Even if it is assumed that there is sufficient clarity in these factual assertions to allow the application of the Aguilar test, none of the possible levels of hearsay fully meet its requirements. If an employee of the Conso Lab Supply Company made any declarations, there is no factual showing of the basis for this declaration and, since there is no identification of the employee, there is also no factual showing that the employee is either credible or reliable in these matters. Similarly, if Special Agent Sennett made any declarations, there is no showing of the factual basis for such declarations. Lastly, if a declarant reported the actions of Special Agent Sennett to the affiant, there is both no showing of the factual basis for this declaration or that the declarant, who is unidentified, is reliable or credible.

The tests required under the Aguilar rule are indeed strict and are designedly so in order to require a Magistrate to make an independent judgment as to the factual assertions made in

application for a search warrant rather than simply accept conclusory statements.

If the Magistrate in the instant case had required that the hearsay declarations contained in the affidavit meet the Aguilar test, then inaccuracies such as those revealed to have been contained in the statement of Mr. DeZan would not have been considered in the determination of probable cause. That such misleading and inaccurate representations were considered, and perhaps were crucial, in such a determination in this case argues strongly for a strict application of the Aguilar test and its requirements.

In sum, the affidavit of Special Agent Tripp contains hearsay declarations which were improperly utilized in the determination of probable cause and, without these declarations, there is insufficient evidence presented in the affidavit to establish probable cause for the issuance of a search warrant.

CONCLUSION

For the reasons stated above, the ruling of the District Court should be reversed, and the seized evidence suppressed.

Respectfully submitted,

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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ROBERT LA GRASSA, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 62-20 60TH RD MASPETH, N.Y.

That on the 22 day of NOVEMBER, 1976, deponent personally served the within BRIEF OF DEFENDANTS-APPELLANTS upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

~~By leaving _____ true copies of same with a duly authorized person at their designated office.~~

By depositing 2 true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.

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Robert La Grassa

Sworn to before me this
22 day of November, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 24-4503908
Qualified in Bronx County
Commission Expires March 30, 1977